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No. 80-100

In the Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY, THE NEWS HERALD, and J. THEODORE DIADIUN,
Petitioners,

vs.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

The first event which occurred in chronological sequence was a dual High School wrestling match between Maple Heights High School and Mentor High School, both local schools in Northeastern Ohio. The Maple Heights wrestling coach was Mike Milkovich who is also the plaintiff in the Libel action and the respondent herein. At that match an altercation, i.e. pushing, shoving and punching occurred among the spectators and the respective team

wrestlers, resulting in minor injuries to several of the wrestlers. Following that, the Ohio High School Athletic Association held an administrative hearing to determine responsibility for the incident and held the host school, Maple Heights, responsible. This resulted in the Maple team being placed on probation for the 1975-76 school year and the team declared ineligible to compete in the forthcoming state wrestling tournaments. A letter of censure was also directed to Coach Milkovich.

A suit in Franklin County Common Pleas Court in Columbus Ohio, was filed on behalf of the wrestlers, by their parents, styled *Ray Barrett, et al. v. OHSAA,* in which Coach Milkovich was not a party. His appearance at that trial was as a witness only. The issues in that case involved Due Process at the Administrative level, property rights of the wrestlers to participate in Tournaments, and incidentally, background evidence as to what had occurred at the Wrestling Match. A decision in that case was rendered granting injunctive relief, and rescinding the letter of censure. The matter was appealed to the District Appellate Court of Ohio, and affirmed. The defendant reporter, Ted Diadiun was present at the Match, and the following OHSAA Administrative Hearings but not at the due process trial.

Approximately one (1) day after the Franklin County Common Pleas decision the Article was published which was the subject matter for the Libel suit filed in Lake County Common Pleas Court of Ohio captioned "Maple Beat the Law with the 'Big Lie'."

The Trial

On April 30, 1975 the libel suit, *Milkovich v. News Herald,* was filed with the Lake County Common Pleas Court of Ohio.

The action proceeded to trial and plaintiff's case included evidence of a film showing the controversial match. Cross-examination of Ted Diadiun established that he, the sports reporter, was not present at the trial in Franklin Common Pleas Court, had not read the transcript of that trial, and that his only link with that trial was a telephone conversation with Dr. Harold Meyer, a witness, who testified he never told Diadiun, that Milkovich lied at the trial (T 112, 113). At the close of plaintiff's case defendants moved for a directed verdict which was granted.

The Decision of the Court of Appeals

The Appellate Court reversed and held there was sufficient evidence presented in accordance with state evidentiary law Ohio Civ. Rule A 4 (Appendix 16a), so as to deny the Motion for Directed Verdict. In support it cited the evidence that the defendant reporter had not attended the Trial nor read the transcript. Further, that the defendant knew the Court had made a finding of where the truth lay, contrary to the Article captioned the "Big Lie." From this evidence the Court concluded reasonable minds could come to different conclusions on the issue of Actual Malice and thereby created a jury question.

The language cited by Petitioner should be considered along with omitted Court language following Petitioner's Brief (P. 9, 10, A 12a) viz:

1. Cited Language:

> "It would appear that, though the press might be at liberty to criticize the judicial process and the

results of a given case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person."

2. Omitted Language:

"Whether, in a given case, it constitutes a reckless disregard of the truth, is not in our opinion, a question of law, but a question of fact based on the evidence before the Court."

The Ohio Court of Appeals, reversed the Decision of the Trial Court.

REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

The Article contains the caption in bold print "Maple Beat The Law With The 'Big Lie'." Such a statement is clearly a statement of fact, and not constitutionally protected. The difference between fact and opinion has been expressed by the Louisiana Supreme Court:

> "The crucial difference between statement of fact, and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writers' opinion, or as a statement of existing fact". *Mashburn v. Collin*, 355 So. 2d 879, 885 (La. 1977).

The Article refers to OHSAA Board of Control's decision to suspend the wrestling team and censure their coach; that Milkovich misrepresented the things that happened at the OHSAA Hearing; that Diadiun was present at the wrestling match, and that Maple told the "Big Lie" (Appendix Petitioner P. 27). All factually having no privity with The Franklin County Common Pleas Court, about which the big lie was published. In fact that Trial did not address itself to responsibility or fault, but to issues of Administrative Due Process vis-a-vis The Wrestlers. It was obvious the Reporter, having no knowledge of what transpired, assumed Milkovich's fault was the issue. The ordinary person when reading this Article must understand and conclude, it is a statement of fact and not opinion since it implies a factual reporting of a previous decision by the OHSAA.

Buckley v. Littell, 539 F.2d 882, 895 (2nd Cir. 1976), *cert. denied* 429 U.S. 1062 (1977) statement that journalist had "lied" was held to be an assertion of fact and defamatory.

Assuming arguendo, that petitioner, reporter Diadiun's statement, of the "Big Lie" and his inference that Coach Milkovich had lied at the Franklin County Court Trial can be characterized as "opinion" in form, it should be treated as a statement of fact for constitutional protection purposes since it was an "opinion" which did not state the facts on which it was based. Opinions which do not state the facts upon which they are based, but which infer or *imply* defamatory facts, should be treated as statements of fact, and therefore deemed constitutionally protected only if made without knowledge or reckless falsity. *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Mashburn v. Collin*, 355 So.2d 879 (La. 1977); *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and RESTATEMENT (SECOND) OF TORTS Sec. 566 (1977).

A simple expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication.

In the instant case, the expression of "opinion" was not based upon disclosed facts, but implied there were undisclosed facts upon which the opinion was based. Diadiun's "opinion" statement that Milkovich lied his way "out of a jam" implied that Milkovich had lied under oath at the due process hearing in the Franklin County Common Pleas Court. The "undisclosed facts" which take this statement outside the realm of absolutely privileged opinion are the statements Coach Milkovich made at the Trial which would allegedly contradict what actually happened (what Diadiun perceived happened at the February 1974 wrestling meet). Diadiun asserted in the Article, in essence that Milkovich lied in Court (Franklin County Common Pleas) *without indicating what was said at the trial.* Indeed, Diadiun did not attempt to ascertain what was said or what issues were addressed at the due process hearing. He did not attend the Trial, did not review a transcript of the proceedings, and did not familiarize himself with the issues being addressed at the Trial. Finally, it was established that Dr. Harold Meyer, OHSAA Commissioner and Diadiun's source for the Article, did *NOT* tell Diadiun that Coach Milkovich lied at the due process trial (T 112; 113).

These facts, *combined* with Diadiun's knowledge that a judicial determination of "truth" had already been made in favor of Milkovich, may be regarded (as the Ohio Court of Appeals correctly concluded) as a "reckless disregard of truth so, as to constitute 'Actual Malice', as to be actionable libel of a public person" (Ohio App. Opinion p. 8). This decision was limited to a ruling on a Motion for Directed Verdict, and accordingly, does not prejudice defendant publisher from presenting truth or any other defense it may have. It simply held that truth as a defense was a jury determination and not a matter of law, at that stage in the Trial proceeding. This is a different concept of law than that presented by Petitioners, that the Court's finding of where the truth lay deprived them of their First Amendment privileges, and their right to present truth as a defense. Again, the import of the Court's decision simply meant, truth as a defense was a jury function and not a matter of law.

Even applying the refined *New York Times* standard as set forth in *Garrison v. Louisiana,* 379 U.S. 64 (1964) the defendant publisher's conduct and comments fall outside the scope of constitutional protection. In *Garrison v. Louisiana, supra,* this Court held:

> "Only those false statements made with a high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."

Such a "high degree of awareness" of the probable falsity of the lying charges has been established in this case. There was ample evidence from which a jury could have concluded that there was reckless disregard by the defendant publisher regarding the truth or falsity of the Article. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967).

Further, the Ohio Court based its finding on several different kinds of evidence including a prior judicial determination of truth, which was not conclusive but cumulative in nature, and any portion of that evidence standing alone without prior judicial determination, as considered evidence, could have been the basis of the decision without raising any constitutional questions.

This is a procedural and evidentiary question, which is a proper and legitimate function of State Courts and does not per se raise constitutional questions nor should it invoke the jurisdiction of this Court.

CONCLUSION

For the reasons expressed a Writ of Certiorari should not be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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